

Glenn Saums

From: Glenn Saums [glenn_saums@nmenv.state.nm.us]
Sent: Monday, January 12, 2004 4:53 PM
To: Rachel Conn
Subject: RE: Antidegradation Comments

Ms. Conn:

This e-mail is to acknowledge receipt of your e-mailed comments on January 12, 2004. I have successfully opened the attached document.

Glenn Saums

-----Original Message-----

From: Rachel Conn [mailto:rconn@amigosbravos.org]
Sent: Monday, January 12, 2004 4:37 PM
To: glenn_saums@nmenv.state.nm.us
Subject: Antidegradation Comments

Dear Mr. Saums:

Please find Amigos Bravos' comments on the Antidegradation Implementation Procedures attached. I would love the opportunity to discuss these issues, with you or with the appropriate person, at a later date.

Please confirm that you have

1. received this email and
2. can open the attachment.

Thank you,

Rachel Conn

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Glen Saums

New Mexico Environment Department

Point Source Regulation Section Program Manager

Surface Water Quality Bureau

P.O. Box 26110

Santa Fe, NM 87502

January 11, 2004

Delivered via email to glenn_saums@nmenv.state.nm.us

Dear Mr. Saums:

As a statewide river conservation organization based in Taos and Albuquerque, Amigos Bravos, Friends of the Wild Rivers, would like to submit the following comments on the Proposed revision to the New Mexico Continuing Planning Process Document to establish antidegradation Policy Implementation Procedures for the Antidegradation Policy in the New Mexico Water Quality Standards (20.6.4.8 NMAC). The cultural and ecological survival of the communities of New Mexico is intricately tied to our rivers, acequias and other water bodies and we strongly support adopting comprehensive and enforceable antidegradation procedures. We have organized our comments first, into a number of general topic areas of positive aspects of the proposed implementation policy and areas that could use some revision. The remaining and bulk of the comments have been organized on a line-by-line review that includes comments and suggested alternative language. Proposed additional language is indicated by underline and language that we are proposing to eliminate is indicated by ~~striketrough~~ unless otherwise indicated, for example, large sections of text that Amigos Bravos proposes to eliminate are identified by upper cased directives such as REMOVE WHOLE PARAGRAPH.

General Comments

Amigos Bravos was pleased with a number of general aspects of the proposed Antidegradation Implementation Procedures.

- Parameter by Parameter Approach:

We strongly support the Department's approach of implementing antidegradation procedures on a parameter-by-parameter basis. It is of the highest importance that the antidegradation review occurs on a parameter-by-parameter basis, or else high quality of entire water bodies will be written off simply with one impairment.

- Existing discharges in certain circumstances

Amigos Bravos also supports the Department in requiring antidegradation review during renewals of existing permits in certain circumstances. It is, however, important to clarify when those "certain circumstances" are. Amigos Bravos believes that certain circumstances in this instance should be defined as when the discharge has never previously undergone an adequate antidegradation review. That may include all existing discharges. While it won't necessarily result in withdrawing the permit if the activity is entrenched in the economy, it should require a review of impact on existing uses (perhaps a plan to prevent such impacts) and it should require alternatives be reviewed and it should require that the most stringent regulatory and statutory requirements be put in place before degradation is allowed to continue.

- Burden of Proof:

Amigos Bravos is pleased that the Department is placing the burden of proof (collecting the data to prove no degradation will occur or that the limited degradation is necessary) on the entity proposing degradation. The success of the antidegradation policy and procedures depends on placing the burden of proof on these entities and making it clear to them that is the case. This has been stated within the policy on page 13. Placing the burden of proof on the entity proposing the discharge the Department is protecting limited state resources.

- Social/Econ Evaluation require adverse impacts of discharge:

By requiring that the applicant provide information on the adverse impacts (including economic, social and environmental impacts) of the new or increased discharge the Department is ensuring that a balanced analysis of the proposed discharge is conducted. This information will have to be reviewed very carefully by the Department as not reporting fully on these impacts provides an obvious benefit to the applying entity. It would also be worthwhile to evaluate the social and economic benefits of not permitting the activity.

Amigos Bravos has a number of general concerns as well.

- De minimus too broad and inappropriate:

The De minimus exemptions for point sources and dredge and fill permits are too broad and in most cases inappropriate. Given what is presented here the Department might as well say that this implementation plan is unnecessary because Amigos Bravos doubts that many, if any, dischargers or permittees will be outside all the de minimus exemptions. We have provided detailed comments on the de minimus exemptions below.

- Alternatives analysis not required for most activities:

Evaluation of alternatives to proposed activities that might degrade high quality waters is the cornerstone of the Tier 2 review. Without the identification and evaluation of

alternatives, it would not be possible to determine whether an activity is “necessary to accommodate important economic or social development in the area.” Unfortunately, most of this document is focused on how to avoid the antidegradation review rather than how to use it to protect the health of our watersheds.

- Public Participation

Public participation, especially in Tier 1 review, is not adequately described and accounted for. The language surrounding public participation opportunities is confusing at times seems to contradict itself.

Line-by-Line Comments and Proposed Changes

Page 1

INTRODUCTION

Line 8: change “~~construed~~” to “taken”

Line 10: add “but not limited to” after including

II. TIER DEFINITIONS

Lines 17-19 are good, although it would be even better to change the language to: “a water may require a Tier 1 review for one parameter and Tier 2 review for a different one.” This gets away from designating tier 1 or 2 waters when in fact they all require both Tier I and Tier II review in some way.

A. Tier 1

We recommend the following in consistency with our comments on the above point:

Line 25: “Tier 1 ~~waters~~ review applies...”

Line 26: “Waters that require Tier 1 review will be identified...”

Line 26: Footnote 1 – It is great that the Department has included these references.

Line 30: Footnote 2 – again, it is helpful to include references.

Line 32: “...basis before proposed activity occurs.”

Line 36-Line 1 (p.2): good that the actual policy/regulation language is included.

Page 2

Line 4: remove “~~regardless of tier designation.~~”

Line 11: remove “~~that are not designated as Tier 1 or Tier 3~~”

Line 12: replace “~~may apply~~” with “applies”.

Line 13: add a comma after basis “basis,”

Line 14: “information, until it can be proven that it doesn’t apply.”; change “~~waters~~” after Tier 1 to “review”; change “~~Tier 2 waters~~” to “the applicability of Tier 2 review”

Lines 19-34: good that the actual policy/regulation language is included.

Page 3

Line 5: change “2) the balance of the need to accommodate important economic and social development in the area in which the water is located and economic and the social impacts of the discharge : and” This language is consistent with the Tier 2 implementation outlined on page 13 line 25-45.

Lines: 12-20: Great paragraph if the clause starting on line 14 after unless is removed. “uses. ~~unless the designated uses are modified through a use attainability analysis, 40 CFR 131.10(j) and 20.6.4.14 NMAC, or adequately protected by segment-specific water quality standards.~~” Reference to UAA and segment-specific standards is inappropriate and unnecessary:

- protection of designated (and existing) uses must be ensured, if the UAA process is followed to remove a designated use (which cannot be done if it is existing) this implementation policy would not apply because the designated uses would be changed;
- there is no need to single out segment-specific standards as a particular way to protect uses because it is sufficient to say that uses are protected by maintaining water quality.

C. Tier 3

Line 31-33: Tier 1 and Tier 3 processes are intended to be black and white - prevent harm and degradation. It is only Tier 2 process where the review can lead to a determination that a limited amount of degradation is allowed. This language seems to be implying that any limited discharge into an ONRW should be sufficiently scrutinized, which is appropriate. Although an argument can be made that the regulations explicitly say no discharge.

Line 33: “~~Such special circumstances must undergo antidegradation review. Such special circumstances must be subject to public and outside agency review, the specific goal and the environmental impact of these activities must be specifically defined, and the intensity and duration of those impacts must be defined and minimized.~~”

Page 4

Flowchart: We found this flowchart helpful as long as it is clear that the pollutants associated with a particular discharge may undergo both Tier 1 and 2 reviews.

Page 5

III. IMPLEMENTATION

Line 3: “The Procedures apply to every proposal a new or increased ~~discharge to activity that has the potential to degrade~~” The Procedures should apply to every activity on the water body and should not be limited to 402 and 404 authority, and should *include* development/revision of plans, TMDLs or even changes to water quality standards that may degrade water quality.

Line 5 and 6: Move “pursuant” down one row - “ pursuant to CWA Section 402

Line 9: “including, but not limited to”

Line 12-18: Amigos Bravos does not agree that development or changes to all these particular documents do not require antidegradation review.

The CPP and the Water Quality Management Plan are constantly being revised and it is possible that procedures that are likely to allow degradation could be added and adopted to these plans. These changes should be subject to antidegradation review.

A. POINT AND REGULATED SOURCES

1. Tier 1

Again, we are glad to see that the Department will require antidegradation review, in certain circumstances, for the renewal of existing discharges.

Line 30: “are consistent with state law, ~~protect~~ water quality standards ~~and implement the state water quality management plan and TMDLs in place or pending.~~”

Line 36: This section implies that Tier 1 review does not need a separate public participation process. This is only true if the TMDL, 402 and 404 processes included a public identification and evaluation of impacts of existing uses. Amigos Bravos urges the Department to ensure that there is adequate public participation for Tier 1 review.

Line 37: Public participation for TMDLs does not necessarily allow for public participation in the antidegradation process. In fact, in Line 15 above, it seems like the Department is trying to say that antidegradation procedures don’t apply to TMDLs (although Amigos Bravos holds that they should). Whatever antidegradation review is carried out, there should be a specific public participation, comment and notification of determination. Documents involved in the determination should be available for public review.

This paragraph needs to be revised so that it is absolutely clear how the public is involved in and has opportunity to submit comments to the Department’s process for determining existing uses and evaluating potential harm to them, under all scenarios.

Page 6

Lines 1-2: What happens if the Department waives the 401 certification? Amigos Bravos is not aware of any way to challenge a waiver because it is not a mandatory certification. If that is the case, it should be stated explicitly within the implementation guidance and alternatives for public participation in antidegradation review should be outlined for these cases.

Line 5: Add “The cornerstone of the Tier 2 review is the alternatives analysis. The applicant must discuss alternatives to the proposed activity, and the Department must weigh the environmental impacts and social and economic importance of each alternative in order to determine whether a lowering of high quality water is “necessary.” Once a determination has been made to allow degradation, the alternatives analysis is also instrumental in minimizing the degradation.”

2. Tier 2

Line 6. a. ~~Determination of Necessity~~ Exemptions

This section seems to mislabeled. This section is really 5 + pages of exemptions and should be labeled as such. The phrase “determination of necessity” should apply once Tier 2 review is already underway, when the Department determines if the proposed action is really necessary. The determination of necessity is intended to

address whether the proposed activity is necessary and can only be determined by conducting an alternatives analysis at the start. A discussion of alternatives is required on page 14, but it is too narrow, and it needs to be first in the list of information gathering (see below for exact language suggestions). The determination of the applicability of Tier 2 review should focus on what was illustrated in the flowchart and discussed on page 2.

Line 12-14: There should not be any specific level (de minimus level) of degradation that is allowable without Tier 2 review. ANY degradation should have to go through the tier 2 review. Given the way that it is proposed here, any assimilative capacity can be completely eroded by point sources.

Amigos Bravos is strongly opposed to the de minimus language found throughout this section of the procedures. If the Department insists on the de minimus language, it needs to be more clearly defined, and a particular cap established. There has a cap established for the 401 certification associated with the dredge and fill permits (see page 10) although Amigos Bravos believes that this cap is too high.

Line 13: “specified level either individually or cumulatively with all other activities”

Line 15: Addressing the reference to limited state resources; the Department has established the burden of proof starting on page 13. Any entity proposing degradation is required to collect the necessary information to identify the existing uses, evaluate the potential harm to them, identify alternatives, and determine social and economic necessity. If this burden of proof is enforced than state resources will not be substantially taxed even without the de minimus exemptions.

Line 20-26: REMOVE WHOLE PARAGRAPH starting with “~~The evaluation...~~”: Using only numeric criteria in the de minimus determination, does not address degradation related to metrics for which New Mexico does not have numeric criteria such as habitat impacts, biocriteria, flow impacts. Protection of the Tier 2 (high quality) aspects of a water body is not achieved by “overlapping designated and existing uses” and NPDES and Dredge-or-Fill Permits because they only protect to the minimum of the standard itself. Tier 2 is intended to protect the assimilative capacity, the water quality better than the standard.

The specific de minimus references on pages 6- are not consistent and not sufficiently protective of the assimilative capacity of the receiving waters. Again, Amigos Bravos strongly urges the Department to eliminate all references to de minimus.

1) Publicly Owned and Private Domestic Treatment Work Discharges

Line 40-42: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The impact of a small POTW could be big on a small stream. It does not limit how many of these exemptions would be allowed and it does not offer an overall cap for erosion of assimilative capacity.

Page 7

Line 2-5: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. It does not make any reference to the existing pollutant load (could already be large); it does not make any reference to the assimilative capacity of the water body. Not allowing it to be used for more than two consecutive permits makes no sense. What happens on the third one? Is the original increase finally evaluated?

Line 7-13: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. It does not make any reference to the existing pollutant load (could already be large); it does not make any reference to the assimilative capacity of the water body. The water conservation or wastewater reuse or diversion program could be helpful with flow problems, but it may have nothing to do with the degradation caused to the water body by the discharge. Not allowing it to be used for more than two consecutive permits makes no sense. What happens on the third one? Is the original increase finally evaluated?

Line 15-17: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. How often does the stream hit the critical low flow? Even if the flow is small compared to the stream, it could be incredibly toxic. Again, this makes no reference to the assimilative capacity of the stream.

Line 19-21: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The department's process for evaluating offsets needs to be explicit and subject to public and other agency review. Point source offsets need to be evaluated for their local erosion of assimilative capacity and nonpoint source offsets need to have a greater than 1:1 ratio and delayed time frame (discharge not allowed until BMP is working) due to uncertainty of nonpoint BMPs. Any offsets should be subject to antidegradation review.

Line 23-29: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The NEPA process is different from antidegradation. An EA doesn't require alternatives and even though an EIS does require analysis of alternatives, it is not driven by the same ultimate protection of existing uses and high water quality, nor in avoiding or minimizing degradation. Although the evaluation in a FONSI could be very useful in the antidegradation analysis and entities proposing the discharge should be directed to look to see if an FONSI has been issued to help them when gathering the necessary data.

Line 34-36: The establishment of a cumulative cap associated with the assimilative capacity for the de minimus calculation applied to the discharges not exempted above is appropriate. However, 10% is too large. Change 10% to 5%.

Page 8

2) Industrial Discharges

Line 10: "less than or equal to ~~10 percent~~ 5 percent" the cumulative de minimus should also be changed to 5 percent (line 23).

Line 12-13: This is confusing- why wouldn't 90% remain if this was followed? Cumulative permitting can only erode the amount stated in line 23 total.

Line 15-17: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The department's process for evaluating offsets needs to be explicit and subject to public and other agency review. Point source offsets need to be evaluated for their local erosion of assimilative capacity and nonpoint source offsets need to have a greater than 1:1 ratio and delayed time frame (discharge not allowed until BMP is working) due to uncertainty of nonpoint BMPs. Any offsets should be subject to antidegradation review.

Line 23: As stated above and with the POTW, the cumulative cap on erosion of assimilative capacity needs to be set at 5 percent. Ten percent allows too much erosion of the quality that we are trying to protect.

Line 44: (1) Amigos Bravos strongly supports this clause.

Page 9

Line 1: (2) is good, Amigos Bravos supports this clause as well. Some states require individual permits for storm water or all general categories when discharging into high quality or outstanding waters or waters with threatened and endangered species or when there have been compliance problems.

a) No Discharge

Line 6-16: Given the many problems with water quality associated with CAFOs line 13-14 seems to be bold and/or naïve. Given the circumstances listed in lines 18-28, there should be a process for applying antidegradation review on the CAFO potential discharges in order to determine the potential harm to existing uses and the degradation of high water quality. Perhaps the risks of discharge could be balanced against the social/economic importance of the dairy and cattle operations overall, or the need for them to be near a stream.

b) Storm Water

Line 36: add language about municipal phase II permits (MS4s)

Line 37-39: ~~"Storm water discharges from construction activities are even more transient because they occur only during construction itself"~~ This statement understates the potential degradation that can be caused by runoff from a construction site. Construction can last a long time and degradation can be severe in a very short time, due to even one storm, without adequate protections in place.

Page 10

Line 1-3: ~~"As a result, storm water discharges that comply with the general permits are not likely to cause significant degradation of water quality"~~ Simply because the general permit requires of all storm water permittees that pollutants be identified and controls be put in place, it does not automatically mean that individual activities will not degrade any high quality waters.

Line 3-5: ~~“Finally, industrial and construction activities generally are considered to have social and economic importance to New Mexico”~~ If degradation is proposed, the social and economic importance should be balanced with the environmental impact (as is described on page 13). The whole point of Tier II review is to determine if this is the case.

Language should be added about antidegradation of general permits when they are reviewed every 5 years and clarify when municipal, construction or industrial storm water discharges will require individual permits and then get an activity-specific antidegradation analysis. The 9th Circuit determined that the municipal general permits will not suffice without specific public review. That would open the door to and antidegradation review as well.

c) Aquifer Remediation

Line 14-16: ~~“The general permit imposes stringent effluent limitations on these discharges, even though they are considered to be relatively clean.”~~ Again, simply because the general permit imposes stringent effluent limitations on this activity does not mean that there are no circumstances where alternatives to this erosion of high water quality, impacts on existing uses, and minimization of degradation (if it is necessary) should be evaluated and presented to the public. This language should be replaced with a process for applying antidegradation to the general permit every 5 years and identifying situations where aquifer remediation discharges will require an individual permit and antidegradation analysis.

Line 18-21: The social and economic importance to New Mexico of ground water for drinking together with the documentation of the hydrologic connection between the surface and ground water is precisely why antidegradation review and public involvement is necessary. Add language reflecting this connection and the importance of a public antidegradation review.

d) Dredge or Fill

Line 32: add “401” between “to” and “review”

Line 36: Why is significant degradation defined here for the first time? It appears to apply to every de minimus calculation. At least, all de minimus approaches should be the same.

Line 39: change “will” to “might”; change 10% to 5%; can’t let one discharger take up to 10%

Line 44: change 10 to 5; overall cap; one discharger could take it all, and none would get more, or each individual discharger could be restricted to smaller amounts, say 2%; should have overall goal across entire policy of protecting 95% of the assimilative capacity for each pollutant in each water body

Page 11

Line 5: “If the Department determines that a discharger will cause significant degradation, the Department will ~~either~~ (1)...”

Line 6: Replace (1) with (2) “require Tier 2 review” and replace (2) with (1) (switch the order of the alternatives) change “~~or~~” to “and”; add “impose conditions to avoid significant degradation by that discharger and other contributors to cumulative degradation.”

Tier 2 is the appropriate process to evaluate the proposed degradation (it may allow some degradation but not significant degradation) and to avoid it if possible through alternatives analysis.

Page 12

Figure 2: Tier 2 Review – Eligibility Flowchart

- As has been detailed above, *all* the boxes from design capacity through EA/EIS should be removed.
- According to the text, there should be an assimilative capacity de minimus test box for POTW/PODTWs. The text calls for Tier II analysis when the discharge, taken together with all other activities, would cause a reduction in the available assimilative capacity of 10 percent or more.
- According to the text, there should be an assimilative capacity de minimus test box for the dredge or fill permits. As mentioned in the test some dredge and fill permits do require antidegradation analysis.
- All the de minimus assimilative capacity tests should be <5%

Page 13

Line 3-6: good

Line 14-21: sets up good predictable process.

Line 25: Step one should be alternatives analysis, bring 4) to 1), broaden language beyond discharge, “An analysis of alternative activities, including any options that would minimize degradation.”; 1) becomes 2).

Line 30: 2) becomes 3); this is GREAT.

Page 14

Line 1: “any other relevant information, such as the local area economic dependence on quality of resource (drinking water, wastewater treatment, tribal subsistence or ceremonial uses, commercial/sport fishing and businesses that support them, tour operators, vacation companies/resorts)”

Line 28: Add “Description of alternatives” as f)

Line 29-32: change letters accordingly

Line 32: add “ Analysis of balance of economic or social importance and whether and what magnitude of degradation is necessary to accommodate it

Line 34: add “Present Department’s antidegradation determination and basis for it; make all information and analysis available to the public” as i)

Line 35-37: change letters accordingly

Line 35: “ Description of condition to be imposed upon discharge or justification of denial”

Page 15

Line 17: “at Department website, at the site, and at public places in closest communities (town hall, post office)”

Line 38: “..to be imposed on discharge or the basis for denial”

Page 16

Line 16 “~~applying the Tier 2 review process as modified by the Department to relect unique factors associated with Tier 3 water~~ allowing the public and other agencies to review alternatives, and assuring the nature and extent of short term impact (duration and distance) is minimized.” It is a good idea to formalize a review of the proposed temporary and short-term activities on a Tier 3 water, but it is not appropriate to allow a social and economic analysis to justify the degradation.

Line 29-36: good language.

Line 41: How can a 401 waiver be appealed?

Amigos Bravos is pleased that the Department has made a serious effort at drafting antidegradation implementation procedures. We are confident that the Department will make the necessary changes to ensure that all of New Mexico’s waters are adequately protected by these procedures

Please do not hesitate to contact Rachel Conn, Amigos Bravos Clean Water Circuit Rider at 505-758-3874 or rconn@amigosbravos.org if further clarification or discussion on the above comments is merited or needed.

Sincerely,
Rachel Conn
Clean Water Circuit Rider